No. 89-994

Supreme Court, U.S.
FILED
MAY 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,
Petitioner,

v.

ROBERT CASEY, Governor of the Commonwealth of Pennsylvania, JOHN F. WHITE, Secretary of the Pennsylvania Department of Public Welfare, and DAVID S. FEINBERG, Director of the Bureau of Policy and Program Development of the Pennsylvania Department of Public Welfare,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
GAREN E. DODGE *
MCGUINESS & WILLIAMS
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600

Attorneys for Amicus Curiae, Equal Employment Advisory Council

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. THIS COURT SHOULD EXTEND ITS *CRAWFORD FITTING* RULE SO AS TO DENY THE SHIFTING OF UNCAPPED EXPERT WITNESS FEES IN A SECTION 1988 CASE	7
A. Section 1988 Permits A Court To Award "Costs" To A Prevailing Party, But Section 1821 Limits The Shifting Of Such Costs To A Specified Amount For An Expert Witness	7
B. In *Crawford Fitting*, This Court Held That Section 1821 Limits The Shifting Of Expert Witness Fees To $30 Per Day For Purposes Of Fed. R. Civ. P. 54(d), And Strongly Implied That Its Ruling Should Have Broad Applicability To Other Fee Shifting Statutes	10
C. This Court Should Strictly Construe The Relevant Statutes, Recognize The Reasoned Opinions In The Circuits Below, And Extend *Crawford Fitting* To Disallow The Shifting Of Excess Expert Fees In A Section 1988 Case—Both For Testimonial And Nontestimonial Work	15
II. AN EXTENSION OF *CRAWFORD FITTING* WILL NOT CONFLICT WITH THIS COURT'S SHIFTING OF PARALEGAL FEES IN *MISSOURI v. JENKINS*	21

TABLE OF CONTENTS—Continued

Page

III. SIGNIFICANT POLICY REASONS SUPPORT AN EXTENSION OF *CRAWFORD FITTING*, AND MILITATE IN FAVOR OF A CONSISTENT INTERPRETATION AMONG THE VARIOUS FEE SHIFTING STATUTES 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases Page

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 11, 23, 25
Black Grievance Comm. v. Philadelphia Elec. Co., 690 F. Supp. 1393 (E.D. Pa. 1988) 18
Boring v. Kozakiewicz, 833 F.2d 468 (3d Cir. 1987), *cert. denied*, 108 S.Ct. 1298 (1988) 17
Central Delaware Branch of NAACP v. City of Dover, 123 F.R.D. 85 (D.Del. 1988) 17
Champion Int'l Corp. v. Int'l Woodworkers of America, 790 F.2d 1174 (5th Cir. 1986), *aff'd*, 107 S.Ct. 2494 (1987) 13, 19, 20
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 3, 13
City of Riverside v. Rivera, 477 U.S. 561 (1986) 3
Crawford Fitting v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S.Ct. 2494 (1987) ..... *passim*
Davis v. County of Los Angeles, 8 Fair Empl. Prac. Cases (BNA) 244 (C.D. Cal. 1974) 16
Denny v. Westfield State College, 880 F.2d 1465 (1st Cir. 1989) 16, 21
Evans v. Jeff D., 475 U.S. 717 (1986) 3
Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3505 (U.S. Jan. 30, 1990) 17
Gilbert v. City of Little Rock, 867 F.2d 1062 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 57 (1989) 17, 18
Glenn v. General Motors Corp., 841 F.2d 1567 (11th Cir.), *cert. denied*, 109 S.Ct. 378 (1988) 3, 19
Gottlieb v. Tulane University, 809 F.2d 278 (5th Cir. 1987) 19
Hensley v. Eckerhart, 461 U.S. 424 (1983) 3
Hillburn v. Commissioner, Conn. Dep't of Income Maintenance, 683 F. Supp. 23 (D. Conn. 1987) *aff'd*, 847 F.2d 835 (2d Cir. 1988) 18
Huertas v. East River Housing Corp., 674 F. Supp. 440 (S.D.N.Y. 1987) 17
Independent Federation of Flight Attendants v. Zipes, 109 S.Ct. 2732 (1989) 24

TABLE OF AUTHORITIES—Continued

	Page
Knop v. Johnson, 712 F. Supp. 571 (W.D. Mich. 1989)	17
Leroy v. City of Houston, 831 F.2d 576 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1735 (1988)	19
McLaughlin v. Richland Shoe, 108 S.Ct. 1677 (1988)	24
Missouri v. Jenkins, 109 S.Ct. 2463 (1989)	6, 21, 22
Morton v. Mancari, 417 U.S. 535 (1974)	11
Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976)	11
Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983)	17
SapaNajin v. Gunter, 857 F.2d 463 (8th Cir. 1988)	17, 18
Scvigny v. Dicksey, 846 F.2d 953 (4th Cir. 1988)	17
Shipes v. Trinity Industries, Inc., 685 F. Supp. 612 (E.D. Tex. 1987)	20
Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976)	12
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)	24
United States v. United Continental Tuna Corp., 425 U.S. 164 (1976)	12
United States v. Yonkers Bd. of Educ., 118 F.R.D. 326 (S.D.N.Y. 1987)	18
Webb v. Board of Education of Dyer County, Tenn., 471 U.S. 234 (1985)	3
West Virginia University Hospitals, Inc. v. Casey, 701 F. Supp. 486 (M.D. Pa.), *vacated*, 885 F.2d 11 (3d Cir. 1988)	4
West Virginia University Hospitals, Inc. v. Casey, 885 F.2d 11 (3d Cir. 1988), *cert. granted*, 58 U.S.L.W. 3545 (U.S. Feb. 27, 1990)	*passim*
Federal Statutes and Rules	
Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*	2, 24
Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988	*passim*
Equal Pay Act, 29 U.S.C. § 206(d)	2, 19, 24

TABLE OF AUTHORITIES—Continued

	Page
Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*	2
29 U.S.C. § 216(b)	3
Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*	2, 24
Title VI of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000d, *et seq.*	2, 24
Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*	2, 8, 24
42 U.S.C. § 2000e-5(k)	2, 23
28 U.S.C. § 1821	*passim*
28 U.S.C. § 1920	*passim*
28 U.S.C. § 1920(6)	14
42 U.S.C. § 1981	2, 13, 24
Fed. R. Civ. P. 54(d)	*passim*
Legislative History	
S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976)	16
Miscellaneous	
Expert Witness Fees as Taxable Costs in Federal Courts—The Exceptions and the Rule, 55 U.Cin. L.Rev. 1207 (1987)	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-994

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,
Petitioner,

v.

ROBERT CASEY, Governor of the Commonwealth of Pennsylvania, JOHN F. WHITE, Secretary of the Pennsylvania Department of Public Welfare, and DAVID S. FEINBERG, Director of the Bureau of Policy and Program Development of the Pennsylvania Department of Public Welfare,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

The Equal Employment Advisory Council (EEAC or Council) respectfully submits this brief amicus curiae. Letters of consent on behalf of both parties have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote

sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are committed firmly to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members, and the constituents of its trade association members, are employers subject to various employment and labor laws, including Titles VI and VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d, *et seq.* and 2000e, *et seq.* EEAC's member companies also must comply with 42 U.S.C. § 1981 and the Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, as well as other employment discrimination statutes. Although this case concerns the issue of medicaid and hospital expert fees awardable to a prevailing party under 42 U.S.C. § 1988, many EEAC member companies, as employers, are subject to the same fee shifting statute since Section 1981, Title VI and the Rehabilitation Act all borrow Section 1988, permitting the shifting to a prevailing party "a reasonable attorney's fee as part of the costs."

Similarly, a "prevailing party" under Title VII is permitted "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 2000e-5(k). Also, the Equal Pay Act, 29 U.S.C. § 206(d), and the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, borrow the language from the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, that permits a court to "allow a

reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b). Thus, EEAC has a direct interest in the issue presented for the Court's consideration in the instant case: whether an award of attorney's fees to a prevailing party under Section 1988 may include compensation for expert witnesses in excess of $30 per day, the limit set by 28 U.S.C. § 1821(b).

As a result of its interest in the issue of Section 1988 and attorney's fees, EEAC has filed briefs with this Court in *City of Riverside v. Rivera*, 477 U.S. 561 (1986); *Evans v. Jeff D.*, 475 U.S. 717 (1986); *Webb v. Board of Educ. of Dyer County*, 471 U.S. 234 (1985); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), among others. EEAC also has filed briefs to the Eleventh Circuit, and to this Court in support of the petition for a writ of certiorari in *Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir.), *cert. denied*, 109 S.Ct. 378 (1988), a case addressing the precise issue presented herein.

Because of its significant experience, EEAC is thus uniquely situated to brief this Court on the relevant concerns of the business community and, in accord with Supreme Court Rule 37, the importance of this case beyond that brought to this Court's attention by the parties.

STATEMENT OF THE CASE

The West Virginia University Hospital (the Hospital or Petitioner) sued the Commonwealth of Pennsylvania over the state's limitation of medicaid payments to out-of-state hospitals. In preparing for litigation, and throughout the six day trial itself, the Hospital relied upon three expert witnesses to

establish as inadequate the state's medicaid payment system and the administrative appeals system under which payment rates can be reviewed.

The district court ruled that Pennsylvania's payment and appeals systems violated federal law, namely the Social Security Act and the Fourteenth Amendment's Equal Protection Clause. *West Virginia University Hospitals, Inc. v. Casey*, 701 F. Supp. 496, 526 (M.D. Pa. 1988). The judge awarded $350,000 in attorney's fees, as well as $45 867 in disbursements, pursuant to Section 1988, which provides that "in any action . . . to enforce a provision of [a relevant law], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Significantly, the judge also awarded as costs the full amount of expert witness fees, even though 28 U.S.C. § 1821(b) limits expert witness fees to $30 per day.

The Third Circuit vacated the district court's award of excess expert fees. *West Virginia University Hospitals, Inc. v. Casey*, 885 F.2d 11, 32-35 (3d Cir. 1989). In doing so, it relied upon this Court's ruling in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S.Ct. 2494 (1987), that Section 1821(b) limits expert fees to $30 a day even though Federal Rule of Civil Procedure 54(d) allows "costs . . . to the prevailing party unless the court otherwise directs." According to the Third Circuit below, *Crawford Fitting* also contains broad language suggesting that in the case of a fee shifting statute such as Section 1988, a court may not award fees in excess of the statutory maximum unless the fee shifting statute expressly makes such an allowance. To do otherwise would be to "infer that Congress has repealed" Section 1821—an inference this Court rejected in *Crawford Fitting*. The Third Circuit also reasoned that a judge is not empowered to exceed statutory limitations without plain evidence of congressional intent, which is absent with regard to Section 1988. 885 F.2d at 34.

SUMMARY OF ARGUMENT

This case involves the interrelation between three statutes. 42 U.S.C. § 1988 permits a court to award to a prevailing party the attorney's fees and costs associated with bringing a civil rights or other specified lawsuit. As part of such "costs," 28 U.S.C. § 1920 permits a court to shift expert witness fees to a losing party, but 28 U.S.C. § 1821 limits the amount of the expert witness fee that can be shifted to $30 per day. The Third Circuit below correctly construed these three statutes, and limited to $30 per day the amount of expert fees that a court may shift in a Section 1988 case.

In so ruling, the Third Circuit properly relied upon *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 107 S.Ct. 2494 (1987), in which this Court ruled that Sections 1920 and 1821 place a cap on the shifting of expert fees for purposes of Rule 54(d) of the Federal Rules of Civil Procedure. Indeed, in very broad language that could apply beyond Rule 54(d) and equally well to this Section 1988 case, *Crawford Fitting* held "that when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limits of § 1821, absent contract or explicit statutory authority to the contrary." 107 S.Ct. at 2496.

The Hospital argues herein that courts ought to have greater discretion in shifting the costs for experts, but this Court made clear in *Crawford Fitting*

that Congress knew what it was doing when it enacted Sections 1920 and 1821. This Court stated that it "will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any other provision referring explicitly to witness fees." 107 S.Ct. at 2499. Indeed, acceptance of the Hospital's argument herein "renders § 1920 superfluous." *Id.* at 2497. As in *Crawford Fitting*, "repeals by implication are not favored, and petitioners proffer the ultimate in implication"—for Section 1988 and Section 1821 "are not even inconsistent." *Id.*

Accordingly, this Court should extend *Crawford Fitting* to deny the shifting of excess expert fees in this Section 1988 case, a result that is also supported by the reasoned opinions in several other courts of appeals. In so ruling, moreover, this Court should recognize that the statutory limit on the amount of expert fees a court may shift applies to both testimonial and nontestimonial work.

Such an extension of *Crawford Fitting* will not conflict with this Court's recent decision in *Missouri v. Jenkins*, 109 S.Ct. 2463 (1989), which permitted the shifting of fees for paralegals and other law firm employees. Paralegals, unlike expert witnesses "contribute[] to the work product for which an attorney bills [the] client." *Id.* at 2470. Moreover, paralegal fees are not regulated by statute, whereas witness fees are expressly governed by Section 1821.

In addition, such an extension of *Crawford Fitting* will not frustrate the civil rights laws, but rather will further Congress' policy of imposing some restraint upon the fees and costs that a court can impose upon a losing party. Such limitations are crucial for the amicus, EEAC, since its member companies face litigation under the various discrimination and civil rights statutes that often involve expensive statistical analyses by experts. More importantly, extension of *Crawford Fitting* to Section 1988 will lead to a much-needed consistency among the various fee shifting statutes.

ARGUMENT

I. THIS COURT SHOULD EXTEND ITS *CRAWFORD FITTING* RULE SO AS TO DENY THE SHIFTING OF UNCAPPED EXPERT WITNESS FEES IN A SECTION 1988 CASE

The Third Circuit below correctly concluded that under this Court's rule in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494 (1987), "section 1988 as presently drafted does not authorize expert fee awards in excess of the statutory cap of thirty dollars per day provided in section 1821(b)." 885 F.2d 11, 35. As we now show, the Third Circuit's extension of *Crawford Fitting* reflects a proper construction of the relevant statutes and leads to a result consistent with congressional intent and with other reasoned court interpretations.

A. Section 1988 Permits A Court To Award "Costs" To A Prevailing Party, But Section 1821 Limits The Shifting Of Such Costs To A Specified Amount For An Expert Witness

This case involves three statutes and their interrelation. The first, 42 U.S.C. § 1988, is a statutory exception to the general rule that each party must bear his own attorney's fees and costs. It provides that "in any action . . . to enforce a provision of [a relevant law], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee

as part of the costs."[1] Section 1988 governs the shifting of attorney's fees and costs in several civil rights and discrimination statutes, and is similar to other fee shifting statutes found in other discrimination laws, such as Title VII of the Civil Rights Act of 1964.

The second statute, 28 U.S.C. § 1920, states that a federal judge "may tax as costs" against a losing party several specifically enumerated items, such as "[f]ees and disbursements for . . . witnesses."[2] Section 1920 is the present day embodiment of "Congress' considered choice as to the kinds of expenses

---

[1] 42 U.S.C. § 1988 provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d *et seq.*] *the court, in its discretion, may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the costs.* (Emphasis added).

[2] 28 U.S.C. § 1920 provides:

> *A judge or clerk of any court of the United States may tax as costs* the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) *Fees* and disbursements *for* printing and *witnesses*;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." (Emphasis added).

that a federal court" may shift. *Crawford Fitting*, 107 S.Ct. 2496.

The third statute, 28 U.S.C. § 1821, defines the "witness fee" specified in Section 1920. Section 1821, in clear and unambiguous language, states that "[e]xcept as otherwise provided by law . . . [a] witness shall be paid an attendance fee of $30 per day for each day's attendance."[3]

"The logical conclusion from the language and interrelation," *Crawford Fitting* at 2497, of these three statutes leads to only one possible conclusion: that Sections 1920 and 1821 limit to $30 per day the amount a court may shift under Section 1988 to a prevailing party as costs for an expert witness. As we now show, this Court has so ruled for purposes of the Federal Rules of Civil Procedure (Fed.R.Civ.P.), and should so rule for this case.

---

[3] The witness fee specified in Section 1920(3) is defined in 28 U.S.C. § 1821 as follows:

> (a)(1) *Except as otherwise provided by law*, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.
>
> * * *
>
> (b) *A witness shall be paid an attendance fee of $30 per day for each day's attendance.* A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance." (Emphasis added).

B. In *Crawford Fitting*, This Court Held That Section 1821 Limits The Shifting Of Expert Witness Fees For Purposes Of Fed. R. Civ. P. 54(d). And Strongly Implied That Its Ruling Should Have Broad Applicability To Other Fee Shifting Statutes

In *Crawford Fitting*, this Court examined the interrelation between Section 1920, Section 1821 and Fed.R.Civ.P. 54(d)—which provides that "costs shall be allowed" against the losing party unless the court otherwise directs.[4] The Court began:

> The logical conclusion from the language and interrelation of these provisions is that § 1821 specifies the amount of the fee that must be tendered to a witness, § 1920 provides that the fee may be taxed as a cost, and Rule 54(d) provides that the cost shall be taxed against the losing party unless the court otherwise directs.

107 S.Ct. at 2497. In very broad language that seemed to encompass more than the three statutes directly at issue in *Crawford Fitting*—even, by implication, statutes such as Section 1988—this Court went on to hold "that when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limits of § 1821, absent contract or explicit statutory authority to the contrary." *Id.* at 2496.

In so holding, this Court expressed obvious concern that its decision be consistent with Section 1988, and that it "conforms to prior interpretations" of the

[4] Federal Rule of Civil Procedure 54(d) provides in part: "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."

relevant fees statutes, namely *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). 107 S.Ct. 2498-99. *Alyeska* had rejected the idea that courts could use their equitable power to award attorney's fees under the "private attorney general" theory, and served as the impetus behind Congressional enactment of Section 1988. As this Court stated in *Crawford Fitting* at 2499:

> Although Congress responded to our decision in *Alyeska* by broadening the availabilty of attorney's fees in the federal courts, see . . . 42 U.S.C. § 1988, it has not otherwise "retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors." 421 U.S. at 260. Thus, *we are once again asked to hold that a specific congressional enactment on the shifting of litigation costs is of no moment. We think that, as in Alyeska, Congress has made its intent plain in its detailed treatment of witness fees.* (Emphasis added).

As if it were contemplating the very case presented herein, this Court In *Crawford Fitting* went on to state:

> *We will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any other provision referring explicitly to witness fees.* As always, "[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), quoting *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974). Any argument that a federal court is empowered to exceed the limitations explicitly set out in §§ 1920 and 1821 without plain evidence of congressional intent to super-

> sede that section ignores our long-standing practice of construing statutes *in pari materia*. See *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168-169 (1976); *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 24 (1976).

107 S.Ct. at 2499. (Emphasis in original in part and added in part).

Like the Hospital herein, the Petitioners in *Crawford Fitting* had argued that federal courts should have the discretion to award costs above and beyond those listed in Section 1920, and in excess of the amount provided in section 1821. This Court rejected such an argument in unambiguous, unmistakable language:

> *We think, however, that no reasonable reading of these provisions together can lead to this conclusion, for petitioners' view renders § 1920 superfluous.* If Rule 54(d) grants courts discretion to tax whatever costs may seem appropriate, then § 1920, which enumerates the costs that may be taxed, serves no role whatsoever. We think the better view is that § 1920 defines the term "costs" as used in Rule 54(d). Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d). *It is phrased permissively because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party.* One of the items enumerated in § 1920 is the witness fee, set by § 1821 at $30 per day. *Id.* at 2497. (Emphasis added).

True, concurring Justice Blackmun, and dissenting Justices Marshall and Brennan, all emphasized that the Court in *Crawford Fitting* did not reach the specific question whether a court may award excess ex-

pert witness fees under section 1988. 107 S. Ct. at 2499 (Blackmun, J., concuring); *id.* at 2500 n. 1 (Marshall, J., dissenting).[5] In its dicta, however,

---

[5] This Court's decision in *Crawford Fitting* actually consists of two companion cases, *Crawford Fitting* and *Champion Int'l Corp. v. Int'l Woodworkers of America*, 790 F.2d 1174 (5th Cir. 1986), *aff'd*, 107 S.Ct. 2494 (1987). Indeed, the *Woodworkers* case involved allegations of race discrimination under 42 U.S.C. § 1981, and thus Section 1988, the precise statute at issue herein. 107 S.Ct. at 2496 ("In No. 86-328, respondent IWA sued petitioner Champion International, alleging racial discrimination in violation of Title VII and 42 U.S.C. § 1981.")

Nevertheless, in his dissent in *Crawford*, Justice Marshall (along with Justice Brennan) stated:

> I do not understand today's decision to decide the question whether a district court may award expert witness fees under 42 U.S.C. § 1988.
>
> [*Crawford*] is an antitrust case; obviously § 1988 is not at issue in that case. And, as an examination of the record reveals, the issue is not properly before the Court in [*Woodworkers*] either. In that case, petitioner, a prevailing civil rights defendant, made a motion for attorney's fees "and expenses" under § 1988 and filed a bill of costs under Rule 54(d). The bill of costs included $31,333.87 for "expert witness fees and expenses." Record 38. On December 30, 1982, the District Court summarily denied the motion for attorney's fees and expenses, based on its conclusion that, under *Christianburg* [*sic*] *Garment Co. v. EEOC*, 434 U.S. 412 (1978), "the lawsuit was brought in good faith and was neither frivolous, unreasonable nor without foundation." Record 1. The court referred all other questions concerning the taxing of costs to a magistrate. *Id.*, at 2. Petitioner did not appeal the District Court's order denying attorney's fees under § 1988. It appealed only the District Court's order of August 24, 1983, denying its application for expert witness fees under Rule 54(d). See Record 33.

107 S.Ct. at 2500 n.1.

this Court came as close as possible to indicating the majority view on the precise issue herein when it stated as follows:

> *We cannot accept an interpretation of Rule 54(d) that would render any of these specific statutory provisions entirely without meaning. Repeals by implication are not favored, and petitioners proffer the ultimate in implication, for Rule 54(d) and §§ 1920 and 1821 are not even inconsistent.* We think that it is clear that in §§ 1920 and 1821, Congress comprehensively addressed the taxation of fees for litigants' witnesses. This conclusion is all the more compelling when we consider that § 1920(6) allows the taxation, as a cost, of the compensation of court-appointed expert witnesses. *There is no provision that sets a limit on the compensation for court-appointed expert witnesses in the way that § 1821 sets a limit for litigants' witnesses. It is therefore clear that when Congress meant to set a limit on fees, it knew how to do so.*

Id. at 2497-98.

In this case, the Hospital asks for an interpretation of Section 1988 that would similarly render Sections 1920 and 1821 "without meaning." Indeed, as in *Crawford Fitting*, the Hospital's request for such a "repeal by implication" is the "ultimate in implication" since Section 1988 is "not even inconsistent" with Sections 1920 and 1821. The Hospital would view a strict construction of these statutes by this Court as "the literal perfection of linguistic purists." Petitioner's Brief at 15 (hereinafter Pet. Br.). But any other reading would emasculate Sections 1920 and 1821.

As we now show, for these and other reasons, this Court should extend *Crawford Fitting* to deny the shifting of expert fees in a Section 1988 case.

C. This Court Should Strictly Construe The Relevant Statutes, Recognize The Reasoned Opinions In The Circuits Below, And Extend *Crawford Fitting* To Disallow The Shifting Of Excess Expert Fees In A Section 1988 Case—Both For Testimonial And Non-testimonial Work

The Hospital argues that *Crawford Fitting*'s reach does not extend to Section 1988, and that expert witness fees assessed under that section should not be subject to a statutory cap. But, as the court below properly stated:

> [*T*]*he broad language of Crawford Fitting strongly suggests that we reach the opposite conclusion.* Although on its facts a Rule 54(d) case, the substance and reasoning in *Crawford Fitting* seems to dictate that, even in the case of a fee shifting statute such as section 1988, a court may not award fees in excess of the statutory maximum of thirty dollars a day unless the fee shifting statute expressly makes such an allowance. *The Court wrote that it "will not lightly infer that Congress has repealed §§ 1920 and 1821, either through rule 54(d) or any other provision not referring explicitly to witness fees."* 482 U.S. at 445, 107 S.Ct. at 2499. Moreover, the Court plainly expressed its disfavor for "[a]ny argument that a federal court is empowered to exceed the limitations explicitly set out in sections 1920 and 1821 without plain evidence of congressional intent to supersede that section." *Id.* at 445, 107 S.Ct. at 2499. (Emphasis added).

885 F.2d at 34. Clearly, Congress has not implied, and this Court should not infer, that Section 1988

has "repealed" Sections 1920 and 1821. Instead, this Court should strictly construe the relevant statutes and affirm the decision of the Third Circuit below.

The Hospital also argues that a court should have discretion to award excess expert witness fees, in part, because the legislative history of Section 1988 so contemplates. According to the Petitioners, a Section 1988 Senate Report, S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), refers to *Davis v. County of Los Angeles*, 8 Fair Empl. Prac. Cases (BNA) 244, 246 (C.D. Cal. 1974), a case that had awarded expert fees as part of a prevailing party's "reasonable attorney's fee." Pet. Br. at 10, 20-21. Thus, Petitioner reasons, "the conclusion compelled is that § 1988 authorizes the payment of experts' fees to a prevailing party." *Id.* at 20. But, as the First Circuit made clear in *Denny v. Westfield State College*, 880 F.2d 1465, 1470-71 (1st Cir. 1989):

> [S]uch an oblique reference [in Section 1988's legislative history] is insufficient to meet *Crawford's* standard of explicitness. Furthermore, appellants have taken the *Davis* citation well out of context. The Senate report did not refer at all to expert witnesses' charges; *Davis* was mentioned only to illustrate the amount of fees properly payable to *attorneys*. And in *Davis*, experts' reimbursement was not even a contested issue—the district court allowed plaintiff's request summarily because the defense did not challenge it.

Like the appellants in *Denny*, the Hospital's reference to *Davis* and the Senate Report in this case falls wide of the mark. As fully explained in Respondent's brief, such snippets of so-called "legislative history" certainly do not rise to the level of specificity required by this Court in *Crawford* to overcome Section 1821.

Indeed, this Court's extension of the *Crawford* rule to Section 1988 is fully supported by the decisions of the lower courts—and other circuits in addition to the Third below have interpreted *Crawford Fitting* to disallow the shifting of excess expert fees in a Section 1988 case. In *Sevigny v. Dicksey*, 846 F.2d 953, 959 (4th Cir. 1988), for example, the Fourth Circuit ruled that "§ 1988 does not provide statutory authority for the awarding of compensation for non-legal experts." Similarly, the Eighth Circuit in *Gilbert v. City of Little Rock*, 867 F.2d 1062, 1062-63 (8th Cir.), *cert. denied*, 110 S. Ct. 57 (1989) (*en banc*), affirmed by an equally divided court the order of the district court awarding expert witness fees as expenses under Section 1988 at the statutory rate of thirty dollars a day. *See also Boring v. Kozakiewicz*, 833 F.2d 468, 474 (3d Cir. 1987), *cert. denied*, 108 S.Ct. 1298 (1988) (stating in dicta that under *Crawford Fitting* "[a] prevailing party in a civil rights case is not entitled to tax such fees as costs.")[6]

---

[6] *See also Central Delaware Branch of NAACP v. City of Dover*, 123 F.R.D. 85, 94-95 (D. Del. 1988) (awarding expert witness fees under section 1988 at statutory rate of thirty dollars a day); *Knop v. Johnson*, 712 F. Supp. 571 (W.D. Mich. 1989) (*Crawford Fitting* prohibits reimbursement of expert witness fees under § 1988 above thirty dollars per day cap); *Huertas v. East River Housing Corp.*, 674 F. Supp. 440, 456 (S.D.N.Y. 1987).

But, as the Hospital argues, and as the Third Circuit below noted, a number of courts examining the question have concluded that fee awards under section 1988 are not limited to the rate set in section 1821(b). *See Friedrich v. City of Chicago*, 888 F.2d 511 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3505 (U.S. Jan. 30, 1990); *SapaNajin v. Gunter*, 857 F.2d 463, 465 (8th Cir. 1988); and *Ramos v. Lamm*, 713 F.2d 546, 559 (10th Cir. 1983). *Ramos*, however, was decided

And as the Third Circuit properly noted, other circuits have "arrived at the same conclusion with respect to fee-shifting statutes similar to section 1988," 885 F.2d at 34—statutes EEAC member companies also face in employment litigation. In *Denny*, 880 F.2d 1465, for example, the First Circuit held in a Title VII sex discrimination case that the *Crawford Fitting* rule must prevail absent some reasonably explicit indication of Congressional intent that witness fees be shifted without regard to the thirty dollars per day cap. The court in *Denny*, 880 F.2d at 1471, stated:

> Failing the discovery of some tangible, reasonably explicity indication of congressional intent that witness fees be shifted without regard to the $30-per-day cap, the *Crawford* rule must prevail. That is especially true in light of the many statutes that, unlike this one, effectively trump the section 1821 limitation by unambiguously authorizing taxation of witness fees. *See Int'l Woodworkers*, 790 F.2d at 1179 n. 7 (listing 28 laws in which Congress saw fit expressly to include expert witness fees as taxable costs in civil actions); Note, *Expert Witness Fees as Taxable Costs in Federal Courts—The Exceptions and the Rule*, 55 U.Cin.L. Rev. 1207, 1217 n. 63 (1987) (similar) . . . . Given this background, congressional silence on the point takes on larger significance. Congress plainly knew how to factor expert witness fees into the calculus of a cost-shifting statute, but chose not to do so in compiling Title VII.
>
> In this case, our hands are tied. Neither Title VII's text nor the history of its costshifting proviso intimates that Congress intended to include witness payments under the counsel fee rubric.

Similarly, in *Gottlieb v. Tulane University*, 809 F.2d 278, 284 (5th Cir. 1987), the Fifth Circuit recognized *Crawford Fitting*'s companion case, *Woodworkers*, to stand for the proposition that expert witness fees are limited to $30 by Section 1821. The Fifth Circuit in *Leroy v. City of Houston*, 831 F.2d 576, 584 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1735 (1988), also found Section 1821 applicable to the fee-shifting provision of the Voting Rights Act. And in *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1575 (11th Cir.), *cert. denied*, 109 S.Ct. 378 (1988), the Eleventh Circuit found Section 1821 applicable to the fee-shifting provision of the Equal Pay Act, because "the broad language in *Crawford Fitting* does not permit a distinction based upon whether or not the award is made under a fee-shifting statute."[7] Ac-

---

before *Crawford Fitting*, and the Eighth Circuit's ruling in *SapaNajin* is called into question by its later decision in *Gilbert v. Little Rock, supra.*

For the reasons explained in Respondent's brief, other cases, such as *Friedrich*, and various district court decisions permitting excess witness fees, are simply wrongly decided, and should be overturned by this Court. *See, e.g., Black Grievance Comm. v. Philadelphia Elec. Co.*, 690 F. Supp. 1393, 1403 (E.D. Pa. 1988); *Hillburn v. Commissioner, Conn. Dep't of Income Maintenance*, 683 F. Supp. 23 27 (D. Conn. 1987), *aff'd*, 847 F.2d 835 (2d Cir. 1988); *United States v. Yonkers Bd. of Educ.*, 118 F.R.D. 326, 330 (S.D.N.Y. 1987).

[7] In its brief at page 22 n.21, Petitioner cites a number of Title VII cases for the proposition that "federal courts have continued to rule that expert witness fees may be awarded to prevailing parties" under statutes similar to Section 1988. All of these Title VII cases, however, *predate Crawford Fitting* and, therefore, mislead this Court in its inquiry.

Indeed, many other pre-*Crawford Fitting* Title VII cases *deny* expert fees. More importantly, as noted, the reasoned Title VII cases decided after *Crawford Fitting* understand-

cordingly, this Court should recognize the reasoning in these cases and apply it herein.

Finally, in extending the *Crawford Fitting* rule to Section 1988, this Court should apply the $30 cap to *nontestimonial* expert fees as well as the time actually spent testifying during trial. As a Texas district court recently stated in construing *Crawford Fitting*'s companion case, *Woodworkers*:

> The distinction between an expert's in-court testimony and out-of-court preparation does not avail the plaintiffs, because it is irrelevant. The *Woodworkers (en banc)* holding applies not only to the expert witness' time and efforts on the stand, but to all of his work. The rule reaches "*services* . . . for the statistical aspects of the case." 790 F.2d at 1176 (emphasis [by court]); *see also Woodworkers* panel decision, 752 F.2d at 164. It is not limited to expert *testimony*. Indeed, the *en banc Woodworkers* court states that is impermissible to tax as costs any expenses not specifically authorized by 28 U.S.C. §§ 1920 and 1821. *See Woodworkers en banc* decision, 790 F.2d at 1179-80.

Shipes v. Trinity Industries, Inc., 685 F. Supp. 612, 614 (E.D. Tex. 1987). Congress knew what it was doing when it enacted Section 1821, and deference should be afforded to that decision. Accordingly, this Court should affirm the decision of the Third Circuit below.

---

ably deny the shifting of expert fees. *See, e.g., Shipes v. Trinity Industries, Inc.*, 685 F. Supp. 612, 614 (E.D. Tex. 1987).

II. AN EXTENSION OF *CRAWFORD FITTING* WILL NOT CONFLICT WITH THIS COURT'S SHIFTING OF PARALEGAL FEES IN *MISSOURI v. JENKINS*

As in the instant case, the prevailing party in *Denny v. Westfield State College*, 880 F.2d at 1469, was faced with the daunting challenge of distinguishing the plain language of the fee shifting statutes and their legislative history, yet still managed to "offer a salmagundi of reasons why the *Crawford* rule should not be be extended."

Among the "salmagundi of reasons" for not following *Crawford Fitting*, the Hospital herein cites this Court's recent ruling in *Missouri v. Jenkins*, 109 S.Ct. 2463 (1989), that attorney's fees under Section 1988 can include fees for paralegals and other law firm employees who assist the attorney in preparing the case. Indeed, in its brief at page 27, the Hospital goes so far as to say that this Court rejected the "plain meaning" rule in construing Section 1988 in *Jenkins*, and that it should do the same herein.

Clearly, this Court did not abrogate the "plain meaning" rule, and *Jenkins* obviously is not dispositive of this case. The true distinction between *Jenkins* and the case herein, of course, is that paralegal time and other law firm litigation expenses "contribute[] to the work product for which an attorney bills [the] client." 109 S.Ct. at 2470. Paralegals are similar to secretaries, messengers and librarians in the sense that they work directly for the attorney. Witnesses, however, are used to provide evidence aside from attorney work product.

Moreover, paralegal fees are not expressly regulated by statute, whereas witness fees are expressly

governed by Section 1821. Although courts may have discretion with regard to fees not regulated by statute, this Court, as stated in *Crawford Fitting*, will not "lightly infer" a repeal of limitations on costs such as expert witness fees specifically enumerated in Section 1920 or 1821. 107 S.Ct. at 2499.

The court below properly recognized this distinction. It stated:

> We believe that the recent decision of the Court in *Missouri v. Jenkins* . . . in no way alters the ruling of the Court in *Crawford*. Unlike *Crawford*, which dealt with witness fees statutorily fixed by Congress as part of the costs, the Court in *Jenkins* dealt with a comparatively new phenomenon in the legal world, the enhancement of attorney's fees by including the fees for services of paralegals and law clerks. *Their fees, however, are not regulated by statute as are witness fees. In fact, Missouri, against whom the fees were taxed, conceded "that compensation for the cost of these personnel should be included in the fee award."* *Id.* at ——, 109 S.Ct. at 2469. Missouri's argument was that section 1988 did not authorize billing paralegals at market rates, but only at their cost to the attorneys hiring them; charging market rates produced a windfall for the attorney.

885 F.2d at 34. (Emphasis added, cite omitted).

Accordingly, it is clear that this Court's extension of *Crawford Fitting* would not conflict with its decision in *Missouri v. Jenkins*. Such an extension, rather, would be consistent with prior rulings.

III. SIGNIFICANT POLICY REASONS SUPPORT AN EXTENSION OF *CRAWFORD FITTING*, AND MILITATE IN FAVOR OF A CONSISTENT INTERPRETATION AMONG THE VARIOUS FEE SHIFTING STATUTES

Several policies support this Court's extension of *Crawford Fitting*, and militate in favor of limiting the shifting of expert fees. One is simply to have some type of restraint upon the amount of fees and costs that a court can tax a losing party. In fact, this Court in *Crawford Fitting* recognized that in enacting Sections 1920 and 1821, Congress "means to impose rigid controls on cost shifting in federal courts." 107 S.Ct. at 2499. There must be no "roving authority to the Judiciary" to shift fees "whenever the courts might deem them warranted." *Alyeska*, 421 U.S. at 260, cited in *Crawford Fitting* at 2499. Indeed, the First Circuit in *Denny* recognized this policy factor as significant in denying the shifting of expert fees under Title VII.[8] 880 F.2d at 1467.

Such a limitation is especially important for EEAC's member companies in employment and civil rights litigation. In such litigation, plaintiffs often attempt to prove discrimination with expensive statistical analyses. If this Court does not give proper deference to the Congressional cap on cost shifting, em-

---

[8] 42 U.S.C. § 2000e-5 provides:

> (k) Attorney's fee; liability of Commission and United States for costs
>
> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

ployers will be unfairly encouraged to settle—even nonmeritorious claims—where it appears that a court could shift expert fees.

More importantly, this Court should construe Section 1988 so that there is some consistency among the various statutes that permit a prevailing party to recover fees and costs. As noted, even though this case involves Section 1988 and medicaid issues, it is of concern to EEAC members since Section 1988 also covers fees awarded under Section 1981, the Rehabilitation Act, and Title VI of the Civil Rights Act. In addition, Title VII, the ADEA and the Equal Pay Act all contain similar language. It is absolutely crucial that this Court construe Section 1821 for 1988 purposes the same way it has construed Section 1821 for purposes of Fed. R. Civ. P. 54(d). *See Independent Federation of Flight Attendants v. Zipes*, 109 S.Ct. 2732, 2735 n.2 (1989) (Section 706(k) of Title VII and Section 1988 "are to be interpreted alike").

As this Court has recognized in *Zipes* and other cases, consistency in interpretation is a laudable goal —particularly among the discrimination and civil rights statutes. Indeed, in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), this Court took great care to interpret the term "willful" for purposes of assessing damages under the ADEA and the FLSA in a manner that is "consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes." *Id.* at 126. And in *McLaughlin v. Richland Shoe*, 108 S.Ct. 1677 (1988), this Court went on to interpret the term "willful" as used in the ADEA's statute of limitations so that it is consistent with the way the term was construed in *Thurston*. Even in *Crawford Fitting*, this Court was careful to ensure that its holding was consistent with *Alyeska* and other constructions of the relevant attorney's fees provisions. 107 S.Ct. at 2498-99.

Accordingly, this Court should recognize the strong policy concerns and extend *Crawford Fitting* to Section 1988.

CONCLUSION

For the foregoing reasons, the amicus respectfully submits that the Third Circuit's decision should be affirmed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
GAREN E. DODGE *
MCGUINESS & WILLIAMS
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae, Equal Employment Advisory Council

May 11, 1990

* Counsel of Record